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Supreme Court, U.S.
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No. 97-1978

In The

Supreme Court of the United States

October Term, 1997

FALCON DRILLING COMPANY, INC.,
FALRIG OFFSHORE (U.S.A.), L.P. and
LIVERPOOL & LONDON STEAMSHIP PROTECTION
& INDEMNITY ASSOCIATION,

Petitioners,

versus

PATRICK VIATOR,

Respondent.

On Petition For Writ Of Certiorari
To The Third Circuit Court Of Appeal
Third Circuit, State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED

Did the Louisiana Court of Appeal for the Third Circuit violate the principles of uniformity recognized by this Court as necessary in application of the Jones Act, 46 USC Sec. 688 et seq., and deny Petitioners' substantive federal rights by failing to apply the same standards of contributory negligence and employer fault under the Jones Act recognized by the United States Court of Appeals for the Fifth Circuit?

PARTES AND LIST PURSUANT TO RULE 29.1

The parties as stated in Pet. Cert. ii.

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BRIEF IN OPPOSITION

Respondent respectfully prays that the petition for a writ of certiorari to the Supreme Court of the United States be denied.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals, State of Louisiana is reported at 701 So.2d 487, 97-264 La. App. 3 Cir. 10/8/87 (La. App. 3 Cir. 1997) as is reproduced at Pet.App.1.

JURISDICTION

As will be shown, there is no jurisdictional basis for this Court to entertain the Petition for Writ of Certiorari. First, no substantive rights were denied the Petitioners and secondly, no conflict exists between the state and federal courts.

STATEMENT OF THE CASE

The facts as recited in the Petition are, of course, skewed in the best light for the Petitioners. While the merits of this case are not at issue, it is mandatory under Supreme Court Rule 15 that Respondent point out to the Court any misstatements of fact. Petitioners' omitting of certain facts adduced at the trial of this case amounts to a misstatement and fails to provide an adequate, much less an acceptable, depiction of the case.

Specifically, at p. 19 of Petitioners' brief, it states, " . . . Mr. Viator allowed too much slack to exist in his safety belt and he lost his balance." However, there was no evidence of how less slack would have prevented the accident. Rather, testimony from Mr. Viator shows that it was the weight of the pipe and the actions of the Driller that threw him off balance. Likewise, testimony from the regular derrick hand indicated that the belts should be adjusted to allow you to walk from side to side or back and forth. Finally, a photograph was shown to Mike Chambliss, the regular derrick hand who also worked on the rig with Respondent. The photograph was of a Derrickman with his safety belt on, leaning out, and latching the latches in a position similar to that of the plaintiff at the time of the accident. Chambliss testified that the Derrickman in that picture was not leaning out too far. Similarly, the driller, Respondent's own boss, Donald Thornton, also testified the same way when shown a similar photograph, and admitted that the Respondent was not leaning out too far.

Next, Petitioners stated "[h]e then attempted to grab the pipe to prevent himself from falling, rather than allowing the pipe to fall. . . . " Thornton testified that the Mr. Viator did nothing wrong and that Mr. Viator did the right thing in trying to hold onto the pipe. The experts for both parties agreed that Mr. Viator acted appropriately.

Petitioners omit the fact that the trial judge found the ACHILLES unseaworthy in addition to its finding of Jones Act negligence. The Third Circuit Court of Appeal affirmed that finding, citing the failure to have an intercom system between the driller and the derrick man as an

unsafe and unseaworthy condition. *Patrick Viator v. London Steamship Protection and Indemnity Association, et al.*, 701 So.2d 487, 495 (La.App. 3rd Cir.1997), *writ denied*, 1998 WL 181651 (La. 1998).

Finally, the defendants have paid the judgment in exchange for Satisfaction of Judgment executed on April 6, 1998 and filed into the trial court record on May 6, 1998. *Resp. App. 1.*

REASONS FOR DENYING THE WRIT

The issue in the present case is narrow and no amount of rhetoric can convert it into one warranting review on certiorari. As will be shown, there is no important question of a constitutional nature requiring review by this Court and no substantive rights were denied the Petitioners. The present decision of the Louisiana Third Circuit Court of Appeal is fully in accord with the reasonable prudent standards of negligence applicable to both parties in this case.

Socony-Vacuum Oil Co., Inc. v. Smith

To place this case in perspective, it is necessary to understand the underpinnings of the special treatment accorded to "seaman" by the Courts and Congress. The Respondent was a Jones Act seaman when he was injured on the vessel ACHILLES. Nearly 60 years ago, in *Socony-Vacuum Oil Co., Inc. v. Smith*, 59 S.Ct. 262, 305 U.S. 424 (1939), this Court noted that

> the seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little

> opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. It is for this reason that remedial legislation [the Jones Act] for the benefit and protection of seamen has been liberally construed to attain that end.

59 S.Ct. 262, 266 (Internal citations omitted)

Gautreaux v. Scurlock

The U.S. Fifth Circuit case of *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997), settled previous jurisprudence with respect to the duty of care owed by both the employer and employee-seaman in a Jones Act case. Simply, the employer and employee are each obligated to act according to the reasonable person standard. The duty owed by each is to act with ordinary reasonable prudence under a given set of circumstances. Thus, the

prior distinction between an employer's "slightest negligence" as opposed to the seaman's "gross negligence" is no longer viable. In short, *Gautreaux* raised in degree the standard by which a seaman's contributory negligence is measured from "slight duty of care" to "ordinary prudence under the circumstances." *Id.* at 339.

Leaving aside the standard of negligence in Jones Act cases, it is important to this Court's consideration of the Petition that this Court is made aware that the plaintiff also asserted an unseaworthiness claim under the general maritime law.[1] *The standard for contributory negligence under the general maritime law of unseaworthiness is one of ordinary prudence.* See *Marceaux v. Conoco, Inc.*, 124 F.3d 730 (5th Cir. 1997). Although the *Gautreaux* decision was not handed down until after the trial judge's decision, the ordinary prudence standard applicable to the Respondent's actions operated under the additional unseaworthiness claim. Consequently, Petitioners' claims that the trial judge or the Third Circuit Court of Appeal

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[1] To be seaworthy, a vessel and its appurtenances must be reasonably suited for the use for which they were intended. The owner's duty to furnish a seaworthy ship is absolute and completely independent of the duty under the Jones Act to exercise reasonable care. Liability under the doctrine of unseaworthiness does not rest upon fault or negligence. A more stringent standard of causation is required in an unseaworthiness claim than in a Jones Act claim. Specifically, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about the injury and that the injury was either the direct result or a reasonably probable consequence of the unseaworthiness. *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1354 (5th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988).

did not recognize the standard of ordinary prudence is an erroneous reading of both the trial court's ruling and the Third Circuit Court of Appeal's opinion. The trial court found the vessel upon which Respondent was injured unseaworthy in addition to the finding of negligence under the Jones Act. The trial judge then concluded that the plaintiff was not negligent. The trial judge correctly found no contributory negligence under the Jones Act as well as under the unseaworthiness doctrine. Therefore, the theoretical foundation asserted by Petitioners collapses as it ignores the fact that the court did indeed analyze the actions of Respondent under ordinary prudence standards under the general maritime law. There is no other way to interpret the trial court's decision.

Petitioners did not mention the unseaworthiness claim perhaps because it would be impossible to explain how a proper application of the ordinary prudence standard in the unseaworthiness claim runs afoul of the law and principles and how their federal substantive rights were denied.

The Third Circuit Court of Appeal's Decision

The reasons given in Petitioners' petition for certiorari for still further prolonging this controversy are wholly lacking in substance. Contrary to the assertion by Petitioners, the opinion issued by the Third Circuit did indeed discuss *Gautreaux's* clarification of the duty of care owed by an employer and the seaman under the Jones Act. The court then reviewed the record under a manifest error standard, taking into consideration the *Gautreaux* standard for Jones Act seaman and employers. In fact,

directly after outlining the *Gautreaux* standards, the Court states:

> "Lacking any indication to the contrary, we will not assume that the trial court applied an incorrect standard. Therefore, ***we*** will not undertake a *de novo* review, but ***will review the record*** under a manifest error standard." (Emphasis ours)

701 So.2d 487, 491

The conclusion is inescapable that the Third Circuit Court of Appeal, in citing those passages from *Gautreaux* which clarified the duty of care, imported implicitly the premise that the *Gautreaux* standard is applicable and then set out on a review of the entire record following the standards set forth in *Gautreaux*, 701 So.2d 487, 491.

The mention of *Gautreaux* in the Third Circuit's opinion was more than a passing reference, was more than an observation unnecessary to the decision, and was more than dicta. *Gautreaux* underlies the Court's discussion on Jones Act liability. It stated no caveats or exceptions to *Gautreaux*. In fact the Court's endorsement of the *Gautreaux* case can be found elsewhere when it cited *Gautreaux* again in the opinion, under the subheading "3. *Falcon's negligence.*", to wit: "As the Fifth Circuit indicated in *Gautreaux*, 107 F.3d 331, the Jones Act contains a liberal *causation* requirement. . . . " (Emphasis ours) 701 So.2d 487, 492.

Therefore, the Third Circuit Court of Appeal applied the *Gautreaux* standard in its review of the record for manifest error in the finding of no fault on the part of the Respondent and 100% fault on the part of Petitioner,

Falcon Drilling Company. This is the only fair reading of the opinion. Petitioners' claims that the Third Circuit Court of Appeal did not apply the same standards recognized by the United States Fifth Circuit Court of Appeals are spurious. The judgment of the Louisiana Third Circuit Court of Appeal is correct.

Marceaux v. Conoco

In any event, the finding of unseaworthiness and 100% fault to the Petitioners should preclude as unnecessary any review of the findings under the Jones Act. This was the Court's approach in *Marceaux v. Conoco, Inc., Id.* In *Marceaux,* the Court affirmed a jury's verdict of unseaworthiness and stated "we need not address the defendant's contentions regarding the sufficiency of the evidence supporting the jury's finding of Jones Act negligence." In the *Marceaux* case, alleging Jones Act negligence pursuant to 46 U.S.C. § 688 and unseaworthiness under the general maritime law, the plaintiff, Leroy J. Marceaux, brought suit against his employer, Conoco, Inc. After a five day trial, the jury returned a verdict in favor of Marceaux. The jury determined that Conoco had been negligent under the Jones Act and that Marceaux had not been contributorily negligent under the Jones Act. Additionally the jury held that the M/V LAKE CHARLES was unseaworthy and that the plaintiff had not been contributorily negligent under the general maritime law.

The defendant appealed the judgment for the plaintiff on the following grounds: (1) that the district court erred in allowing the plaintiff's expert, Dr. Gary Nelson,

to testify at trial, **(2) that the evidence was insufficient to support a verdict of Jones Act negligence or unseaworthiness,** and (3) that the district court committed reversible error when it refused to instruct the jury as to the plaintiff's alleged additional duty to make the work place safe or to inspect the premises. The fact that the appellate court would not even consider reviewing the claims of error regarding the Jones act negligence findings by the jury, suggests that *if the evidence was such that the jury found unseaworthiness under the more demanding standards, certainly the evidence was sufficient to maintain the negligence claims under the Jones Act.* **Such is the case before this Court.**

Crawford v. Falcon Drilling

Petitioners cite *Crawford v. Falcon Drilling Co.*, 113 F.2d 1120 (5th Cir. 1997) in support of its argument for review. Reliance on the case is misplaced. Although at first blush, the cases seem similar, a closer look indicates otherwise. Petitioners' reliance on that case is for several reasons unavailing. First, in *Crawford*, the Court based its decision in part on the fact (1) that the trial judge entered written Conclusions of Law, *specifically stating that a seaman has a duty, albeit slight, to use reasonable care to protect himself* – clearly out of sync with *Gautreaux*, and, perhaps more significantly (2) that the trial judge listed facts which would have amounted to a breach of duty to protect oneself had the proper standard been applied. In addition, the vessel was *not* found to be unseaworthy.

In the case before the Court, the trial judge was very specific in saying that Mr. Viator was not negligent in his

work that day and the judge never stated any reliance on the "slight negligence" standard. Likewise, on appeal, the Louisiana Third Circuit reviewed the record specifically in light of *Gautreaux* to determine whether Respondent was comparatively negligent, under the *ordinary prudence* standard, and whether he should be assessed with a portion of the fault. The court stated, "[h]aving reviewed the *entirety* of the testimony and evidence on the issue, we conclude that there is sufficient evidence in the record to support the trial court's conclusion that Viator was not at fault in the accident." (Emphasis ours) 701 So.2d 487, 495. The Court cites conclusions of the experts, including defendants' experts, who concede that Respondent did nothing wrong. Lastly, in the instant case, the vessel was found to be unseaworthy.

CONCLUSION

Supreme Court, Rule 10 provides that "[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion." It further states that "[A] petition for a writ of certiorari will be granted only for compelling reasons. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Nothing in the Petition provides a *compelling reason* for this Honorable Court to grant the writ of certiorari. Since no substantive federal rights have been denied the Petitioners, no constitutional issues are presented, and there is an absence of conflicting decisions, certiorari should be denied. Petitioners are merely seeking to prolong the

case, and granting the writ would invite wasteful litigation.

Nor is this case the vehicle for this Court's consideration, clarification, or establishment of the Jones Act negligence standards applicable to state courts. Louisiana courts, including the Third Circuit Court of Appeal, *are applying the Gautreaux* standards. See, e.g., *Walton v. Cooper/T. Smith Stevedoring*, 1998 WL 102972 (La. App. 4 Cir. 3/4/98); *Parks v. Pine Bluff Sand & Gravel Co.*, 1998 WL 63805 (La. App. 3 Cir. 2/18/98); *Nelton v. Crewboats, Inc.*, 706 So.2d 183 (La. App. 4 Cir. 12/30/97); *Jenkins v. Sonat Offshore U.S.A., Inc.*, 705 So.2d 1184 (La. App.1 Cir. 12/29/97); *Vendetto v. Sonat Offshore Drilling Co.*, 701 So.2d 243 (La. App. 1 Cir. 9/23/97); *Foster v. Destin Trading Corp*, 700 So.2d 829 (La. 1997). There is no conflict between the United States Court of Appeals for the Fifth Circuit and the Louisiana state courts. In that respect there is no jurisdictional basis for this Court to entertain the Petition.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX

PATRICK VIATOR	*	DOCKET NO.:
VERSUS	*	95-65818 2A
LIVERPOOL AND LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION, FALCON DRILLING COMPANY, INC. AND FALRIG OFFSHORE (U.S.A.), L.P.	*	15TH JUDICIAL DISTRICT COURT
	*	VERMILLION PARISH, LOUISIANA

SATISFACTION OF JUDGMENTS

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BE IT KNOWN that on the day and date hereinafter mentioned, before the undersigned Notary Public., in and for the aforesaid Parish and State, personally came and appeared:

> PATRICK VIATOR, a person of full age and a resident domiciliary of Iberia Parish, Louisiana; and
>
> JAMES PARKERSON ROY, a person of full age and a resident domiciliary of Lafayette Parish, Louisiana,

who after being duly sworn, declared:

That JAMES PARKERSON ROY is the attorney for PATRICK VIATOR and acknowledges receipt by Plaintiff,

PATRICK VIATOR, of the sum of SIX HUNDRED SEVENTY-NINE THOUSAND FOUR HUNDRED SIXTY-SIX AND 27/100 ($679,466.27) DOLLARS.

APPEARERS further acknowledge that said amount is received in full and complete satisfaction of the Judgments rendered herein in favor of PATRICK VIATOR against FALCON DRILLING COMPANY, INC., FALRIG OFFSHORE, INC. (U.S.A.) L.P., AND LIVERPOOL & LONDON STEAMSHIP PROTECTION & INDEMNITY ASSOCIATION by the 15th Judicial District Court for the Parish of Vermilion, State of Louisiana and the Louisiana Third Circuit Court of Appeal, and APPEARERS do hereby direct the Clerk of Court for the 15th Judicial District Court for the Parish of Vermilion, State of Louisiana, to remove and mark the said Judgments as being satisfied and to otherwise cancel and discharge the Judgments, upon payment of costs by the Defendants.

THUS DONE AND SIGNED on this 6th day of April, 1998, in multiple originals in the presence of the undersigned competent witnesses and me, Notary, after due and complete reading of the whole, at Lafayette, Louisiana.

WITNESSES:

/s/ Sandra Migues

/s/ Susan B. Thomas

/s/ Patrick Viator
PATRICK VIATOR

/s/ Darlene J. Pelletur
NOTARY PUBLIC

WITNESSES:

/s/ Sandra Migues

/s/ Susan B. Thomas

/s/ James Parkerson Roy
JAMES PARKERSON ROY
Attorney for Plaintiff,
PATRICK VIATOR

/s/ Darlene J. Pelletur
NOTARY PUBLIC